BRE SDN BHD & ORS

v.

TUN DATUK PATINGGI HJ ABDUL RAHMAN YA'KUB

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: Q-02-434-96]
11 MARCH 2005

TORT: *Defamation - Libel - Libellous open letter in newspaper - Whether impugned words defamatory, test to be applied - Qualified privilege and public interest, principles and considerations - Justification and onus of proof - Whether publication a fair comment or defamatory assertion of fact - Decision of trial court in action for libel, appellate intervention*

The plaintiff brought an action for libel against the defendants, claiming damages and an injunction. It was alleged that an article (a letter to the editor) published in *The People's Mirror* by the defendants was defamatory of the plaintiff (who was a former Chief Minister as well as a former Governor for the State of Sarawak). After a full trial, the learned judge found for the plaintiff and awarded him RM100,000 as compensatory damages. Dissatisfied, the defendants appealed, raising the following issues/defences: (i) that the words complained of were not defamatory, ie, they did not bear the pleaded meaning; (ii) that even if the words were defamatory, they were published without malice and on an occasion of qualified privilege; (iii) justification; and/or (iv) fair comment.

Held (dismissing the defendants' appeal)
Per Hashim Yusoff JCA delivering the judgment of the court:

[1] The learned judge had come to a clear finding that the words complained of were defamatory of the plaintiff. He found that the words alleged or implied that the plaintiff was unscrupulous, dishonourable, ruthless, selfish and greedy for power and wealth, and was politically divisive and manipulative. He also found that a reasonable person reading those words would not have come to a different conclusion. The learned judge had adopted the correct test, namely, whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the minds of reasonable men or whether they would tend to lower the plaintiff in the estimation of right thinking members of society generally. (p 651 d-g)

[2] In respect of qualified privilege, the learned judge had held that "a matter of public interest does not necessarily entitle anyone to assume a duty to communicate it to others, especially if any statement [in] that matter may be libellous". The learned judge was right in finding that the defence of qualified privilege failed because the article was not specifically pleaded to be a report on the run-up to the Oya State Assembly by-election that was taking place. Indeed, the plaintiff was not even a candidate in the by-election. Public interest and public benefit are necessary, but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough. There is no media privilege under the common law. (pp 652 g-h & 653 a)

[3] The plaintiff's complaint was aimed at the "imputations couched in specific terms or charges of wrong-doing" that could be concluded from the impugned words. The defendants, on the other hand, did not even suggest an alternative imputation that could arise from the said words. Bearing in mind s. 8 of the Defamation Act 1957, the burden was on the defendants to establish the truth of those specific charges and imputations, which they failed to do so. Hence, their defence of justification failed. (p 653 d-h)

[4] The learned judge was correct in his conclusion that the words complained of were not capable of being a fair comment. He rightly found that the article contained certain assertions of fact that were defamatory of the plaintiff. Indeed, a comment is a statement of opinion on facts truly stated; a libellous statement of fact is not a comment or criticism on anything. (p 654 a-c)

[5] An appellate court will rarely interfere with the findings of a trial court in an action for libel. (p 654 d)

[Appeal dismissed; award of damages upheld.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif memulakan tindakan libel terhadap defendan-defendan, menuntut gantirugi dan injunksi. Ianya didakwa bahawa suatu artikel (surat kepada pengarang) yang disiarkan oleh defendan-defendan di dalam *The People's Mirror* telah memfitnah plaintif (seorang bekas Ketua Menteri dan bekas Gabenor Negeri Sarawak). Selepas perbicaraan, yang arif hakim telah membuat keputusan yang berpihak kepada plaintif dan membenarkan award gantirugi pampasan sebanyak RM100,000. Tidak berpuas hati, defendan-defendan merayu dan membangkitkan pembelaan-pembelaan berikut: (i) bahawa perkataan yang disungutkan tidak bersifat memfitnah, iaitu, ia tidak mencetus maksud yang

diplidkan; (ii) bahawa jikapun perkataan yang disungutkan bersifat memfitnah, ia disiarkan tanpa niat jahat dan dengan perlindungan bersyarat; (iii) justifikasi; dan (iv) komen yang adil.

Diputuskan (menolak rayuan defendan)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

[1] Yang arif hakim telah membuat dapatan yang jelas bahawa perkataan-perkataan yang disungutkan telah memfitnah plaintif. Beliau mendapati bahawa perkataan-perkataan yang dikatakan atau disiratkan itu menunjukkan bahawa plaintif adalah seorang yang rakus, tidak bermaruah, zalim, tidak bertimbang rasa, tamakkan kuasa dan kekayaan serta berpolitik untuk memecah belah dan mendapat pengaruh. Beliau seterusnya merumuskan bahawa seseorang yang munasabah yang membaca perkataan-perkataan tersebut tidak akan mencapai konklusi yang berbeza. Yang arif hakim telah memakai ujian yang betul, iaitu, sama ada perkataan-perkataan yang disungutkan itu bertujuan untuk mendedahkan plaintif kepada kebencian, persendaan atau kemarahan pada pemikiran orang-orang yang munasabah ataupun sama ada ianya akan merendahkan plaintif pada pandangan ahli-ahli masyarakat yang berfikiran waras.

[2] Berkaitan perlindungan bersyarat, yang arif hakim mendapati bahawa "soal kepentingan awam tidak semestinya bermaksud seseorang berhak mendedahkannya kepada orang lain, terutama jika ada kenyataan di situ yang bersifat memfitnah". Yang arif hakim betul apabila mendapati bahawa pembelaan perlindungan bersyarat gagal kerana artikel tersebut tidak secara khusus diplidkan sebagai suatu laporan mengenai hal ehwal pilihanraya kecil Dewan Undangan Negeri Oya yang sedang berjalan. Plaintif, malah, bukanlah seorang calon dalam pilihanraya kecil itu. Kepentingan awam dan manfaat awam memanglah perlu, tetapi ianya tidak memadai jika tiada apa-apa yang lain. Harus wujud suatu kewajipan untuk menyiarkan kepada orang ramai serta suatu kepentingan meluas di kalangan orang ramai untuk mendapatkan maklumat tersebut; sebahagian sahaja orang awam adalah tidak memadai. Juga tidak wujud perlindungan media di sisi common law.

[3] Rungutan plaintif adalah dituju kepada "tuduhan-tuduhan yang dizahir secara khusus sebagai dakwaan salah laku" yang dapat dirumus dari perkataan-perkataan yang dicabar. Defendan-defendan, sebaliknya, tidak mencadangkan walaupun satu tuduhan alternatif yang boleh berbangkit dari perkataan-perkataan tersebut. Mengambilkira s. 8 Akta Fitnah 1957, beban adalah atas defendan-defendan untuk membuktikan kebenaran dakwaan-dakwaan khusus dan tuduhan-tuduhan tersebut, yang mana mereka gagal melakukannya. Dengan itu, pembelaan justifikasi mereka gagal.

[4] Yang arif hakim betul dalam rumusannya bahawa perkataan-perkataan yang disungutkan bukanlah suatu komen. Beliau dengan betulnya mendapati bahawa artikel mengandungi pengataan-pengataan fakta tertentu yang memfitnah plaintif. Komen adalah satu pernyataan pendapat atas fakta yang dipapar secara tepat; kenyataan fakta yang bersifat memfitnah bukanlah komen atau kritikan terhadap sesuatu apa jua.

[5] Dalam sesuatu tindakan libel, pendapat mahkamah bicara jarang sekali diganggu oleh mahkamah rayuan.

Rayuan ditolak; award gantirugi disahkan.]

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1965] 31 MLJ 142 ***(refd)***
Blackshaw v. Lord [1983] 2 All ER 311 ***(foll)***
Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [2001] 1 CLJ 663 FC ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1985] 1 MLJ 334 ***(refd)***
Lange v. Australian Broadcasting Corp [1997] 189 CLR 520 ***(refd)***
Lee Kuan Yew v. JB Jeyaretnam [1979] 1 MLJ 281 ***(refd)***
Odger v. Matimer [1872] 28 LT 472 ***(refd)***
Reynolds v. Times Newspaper [1999] 4 All ER 609 ***(refd)***
S Pakianathan v. Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Syed Husin Ali v. Sharikat Pencetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 8, 12

Other source(s) referred to:
Gately, *Libel & Slander*, 9th edn, paras 36.19, 36.25, 36.26

For the appellants - Sim Hui Chuang; M/s Reddi & Co
For the respondent - Chong Siew Chiang (Cheng Hui Hang with him); M/s Cheng & Cheng

[Appeal from High Court, Kuching; Suit No: KG 400-1986]

Reported by Gan Peng Chiang

JUDGMENT

Hashim Yusoff JCA:

This is an appeal against the decision of the learned High Court Judge in Kuching given on 28 February 1995. We heard this appeal and reserved our judgment to be given at a later date. We now give our judgment.

Facts Of The Case

The respondent (the plaintiff in the court below) filed a claim against the appellants (the defendants in the court below) for damages as well as for an injunction and costs for libel contained in an article (exh. P1 A) appearing in a daily newspaper in Sarawak called "The People's Mirror" published on 22 June 1986 (hereinafter referred to as "the said article"). The said article was featured as follows:

> Why stoop so low to scoop so little.
>
> Dear Editor,
>
> The Nomination Day for the Oya, N.32 on 17th June was a very colourful and memorable one.
>
> I was there and it was indeed a rich experience.
>
> I have never seen the commitment to the Barisan Nasional by the people of Batang Oya as open as it was demonstrated on 17th June, 1986.
>
> It was indeed a sad day for Tun Rahman to be openly seen supporting and leading a group which is bent on trying to destroy the unity of the people of Batang Oya.
>
> The people have rightly given him an appropriate reception by totally ignoring his presence there.
>
> This must have been a big blow to his ego and indeed a great humiliation to the man who was once held in high respect when he was the Chief Minister and the Head of State.
>
> How could he stoop so low?
>
> What is the basis for accusing the Barisan Nasional and Datuk Patinggi Taib of splitting the people and creating hatred and bitterness between the Melanaus of Batang Oya.
>
> Doesn't he realise that it was Datuk Haji Salleh and his cronies supported by Tun himself, who started the circus which later turned into a serious political confrontation.

a

To-day, this very group of people are turning the people of Batang Oya into political tools for the sole purpose of gaining power.

Their sole and ultimate purpose is to gain power because only through the exercise of power one can control the riches and resources of Sarawak.

b

As a voter in Oya, N.32, I publicly declare that I will vote for the Barisan Nasional because it would be totally useless to vote for the independent candidate who has no means to deliver the goods.

I hope and urged other voters in the Oya Constituency to reject Datuk Haji Salleh so that the issue will be settled once and for all.

c

A Voter of Oya N.32

After a full trial, the learned judge found in favour of the respondent and awarded the sum of RM100,000 against the appellants as compensatory damages together with interest at 8% per annum from date of judgment until full payment as well as an order for injunction and costs. Hence, this appeal by the appellants.

d

Learned counsel for the appellants, in his submission raised several issues which can be summarized as follows:

e

(i) that the words complained of do not bear the pleaded meaning(s) ie, not defamatory;

(ii) that if the words complained of are defamatory, the occasion on which the same were published without malice was of qualified privilege;

f

(iii) justification;

(iv) fair comment.

Before going into the meanings of the words complained of, it is pertinent to know the background of the parties referred to therein. The respondent was the Chief Minister of Sarawak from 1970 until his resignation in 1981. Thereafter he became the Head of State for Sarawak from 1981 until 1985.

g

There was a by-election for the State constituency of Oya after Datuk Hj. Salleh Jaffaruddin ("Datuk Salleh") resigned as Assemblyman for Oya. Datuk Salleh re-contested in the by-election as an independent candidate against the Barisan Nasional candidate Wan Madzihi Mahdzar ("Wan Madzihi"). Both candidates are the relatives of the respondent. The Chief Minister of Sarawak,

h

i

Datuk Patinggi Haji Abdul Taib bin Mahmud is a nephew of the respondent. The respondent supported Datuk Salleh, while the Chief Minister supported Wan Madzihi in the said by-election.

On nomination day, at the Nomination Centre the respondent was with Datuk Salleh leading a crowd of supporters while the Chief Minister, members of his Cabinet and Federal Ministers were also present to support and campaign for Wan Madzihi. There was a lot of shouting and booing by supporters on both sides who gathered at the Nomination Centre.

Whether The Words Complained Of Are Defamatory

Coming to the issue whether the words complained of, in particular those paragraphs which specifically made reference to the respondent, were defamatory or not, the learned judge said:

> … it is my finding in law that the words complained of were capable of being defamatory and were in fact defamatory of the Plaintiff and of him in the way that was ascribed by him in paragraph 4 of the Statement of Claim. The sting lay in the allegations and implications that the Plaintiff acted in a way to divide the people of Batang Oya and using them as his political vehicle to gain power so that he could control the wealth of Sarawak for himself. To put it briefly, the words complained of alleged and implied that the Plaintiff was unscrupulous, dishonourable, ruthless, selfish and greedy for power and wealth. With such allegations or implications no reasonable man would have found the words complained of to be anything else other than being defamatory of the Plaintiff.

Learned counsel for the appellants submitted that although the learned judge said in his judgment that the article was capable of the injurious imputation meaning, he did not say which meaning it was. On this point we are unable to agree with the said submission. The paragraph we referred to above clearly states the meaning of the allegations and imputations of the words complained of as found by the learned judge.

In coming to his findings we are of the opinion that the learned judge had adopted the correct test ie, whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right thinking members of society generally. (See *J.B. Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334; *Syed Husin Ali v. Sharikat Pencetakan Utusan Melayu Bhd. & Anor* [1973] 2 MLJ 56 at p. 58 D (right)).

Qualified Privilege

Learned counsel for the appellants in his written submission argued that even if the words complained of were defamatory, the occasion on which the same were published was without malice and of qualified privilege. He referred to the case of *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 1 CLJ 663 in which Mohamed Dzaiddin CJ *inter alia* stated "In fact, the correct authority on qualified privilege in the context of the respondent's defence is *Lange v. Australian Broadcasting Corp.* [1997] 189 CLR 520 and not *Lange v. Atkinson*."

It was further argued that the words complained of ie, the letter to the editor was published on 22 June 1986. This was about five days after nomination day of the by-election. The words complained of, read as a whole, concerned an on-going by-election and the respective support of the two opposing sides. The words complained of therefore concerned politics and discussion of political matters. The political discussion was about the allegations of disunity, animosity and hatred, and the fight for power. In *Reynolds v. Times Newspaper* [1999] 4 All ER 609 Lord Nicholls at p. 626 para. g-h said:

> The Court should be slow to conclude that a publication was not in the public interest and, therefore the public had a right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

In reply, counsel for the respondent submitted that the appellants had relied on the conventional/traditional qualified privilege, that there was a duty to communicate to the public and the other party had an interest to receive.

In his judgment, the learned judge had considered this issue of qualified privilege and found as follows:

> In all, DW5 only emphasized that the by-election had generated great public interest. But a matter of public interest does not necessarily entitle anyone to assume a duty to communicate it to others especially if any statement to that matter may be libellous.

In our judgment we agree with the learned judge's finding that on the balance of probabilities the defence of qualified privilege fails in this instant appeal because the said article was not specifically pleaded to be a report on the by-election and that it was confined to the voters of the Oya constituency and moreover, the respondent was not even a candidate for the by-election. As stated by Stephenson LJ at p. 327 in *Blackshaw v. Lord* [1983] 2 All ER 311, "Public interest and public benefit are necessary … but not enough without more. There must be a duty to publish to the public at large and an interest

in the public at large to receive the publication; and a section of the public is not enough." Even learned counsel for the appellants had conceded that there is no media privilege under the common law. He also conceded in the court below that the appellants were neither relying on s. 12 of the Defamation Act 1957.

Learned counsel for the appellants also submitted that the learned judge had erred in finding that the words complained of were published maliciously as there was no basis for the finding of express malice. On this issue, we agree with the learned counsel for the respondent that it was not pleaded as one of the grounds of appeal and therefore should be disregarded. In any event, even if it were to be considered, we could find nothing wrong with the learned judge's finding that there was express malice on the part of the appellants (see *S. Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 or by inference (see *Abdul Rahman Talib v. Seenivasagam & Anor.* [1965] 31 MLJ 142.

Justification

Learned counsel for the appellants submitted that the words complained of were not capable of bearing and did not in fact bear the meanings pleaded in para. 4 of the statement of claim. In his judgment the learned judge found that the respondent had relied on imputations couched in specific terms or charges of wrong-doing that could be concluded from the words complained of. His Lordship also noted that the appellants did not suggest any alternative imputations that could arise from the said words in the said article. The burden was therefore on the appellants to establish the truth of those specific charges or imputations bearing in mind s. 8 of the Defamation Act 1957.

In his judgment, the learned judge found that there was no evidence adduced that the respondent had strong ties with the local communities of the Oya constituency or that the by-election was a proxy battle between the respondent and Datuk Patinggi Hj. Abdul Taib Mahmud, the Chief Minister of Sarawak. Nor did anyone testify that the situation during nomination day was tense. Further it was the witnesses for the appellants who had testified that a concert was even held during the campaigning period. The learned judge also found that none of the appellants' witnesses could say as a fact that the by-election was a test of political strength between the respondent and the Chief Minister. His Lordship therefore held on a balance of probabilities that the appellants failed to establish the truth of the material statements in the words complained of and therefore their defence of justification failed. We see no reason to disagree with the learned judge's findings on this issue for the reasons as stated above.

Fair Comment

It was submitted by learned counsel for the appellants that the subject matter was the by-election, whereby the role of the respondent, the candidate Datuk Salleh and his group and what they were trying to achieve was indicated with sufficient clarity to justify comment being made.

The learned judge had however in his judgment, said that he was unable to find that the words complained of were capable of being comments. His Lordship was of the view that the said article contained certain assertion of facts defamatory of the respondent and nothing has been shown by the appellants to the contrary.

We agree with the learned judge's findings as it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see: *Lee Kuan Yew v. J.B. Jeyaretnam* [1979] 1 MLJ 281).

It is now the well-settled rule that in a finding of "libel" or "no libel", the appellate court would rarely interfere because, this is due to the difficulty of applying the principle to a finding that is to a considerable extent, a matter of opinion. (See: *Gately on Libel & Slander*, 9th edn., paras 36.19; *Odger v. Matimer* [1872] 28 LT 472).

The Award

Regarding the award, learned counsel for the appellants did not submit on this matter. However, looking at the grounds of judgment of the learned judge, we are satisfied that his Lordship had considered the relevant factors by taking into account the position of the respondent and the injury caused by the libel to his reputation in assessing the proper damages to be awarded to him. The appellate court will not interfere with an award of damages unless the amount was unreasonable or exhorbitant because damages in libel action are at large (see *Gatley on Libel & Slander*, 9th edn, paras. 36.25; 36.26).

Based on the above reasons, we find no cause to interfere with the findings of the learned judge and therefore dismiss this appeal with costs and order that the deposit be given to the respondent towards the account of taxed costs.